TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 42

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, PETITIONER

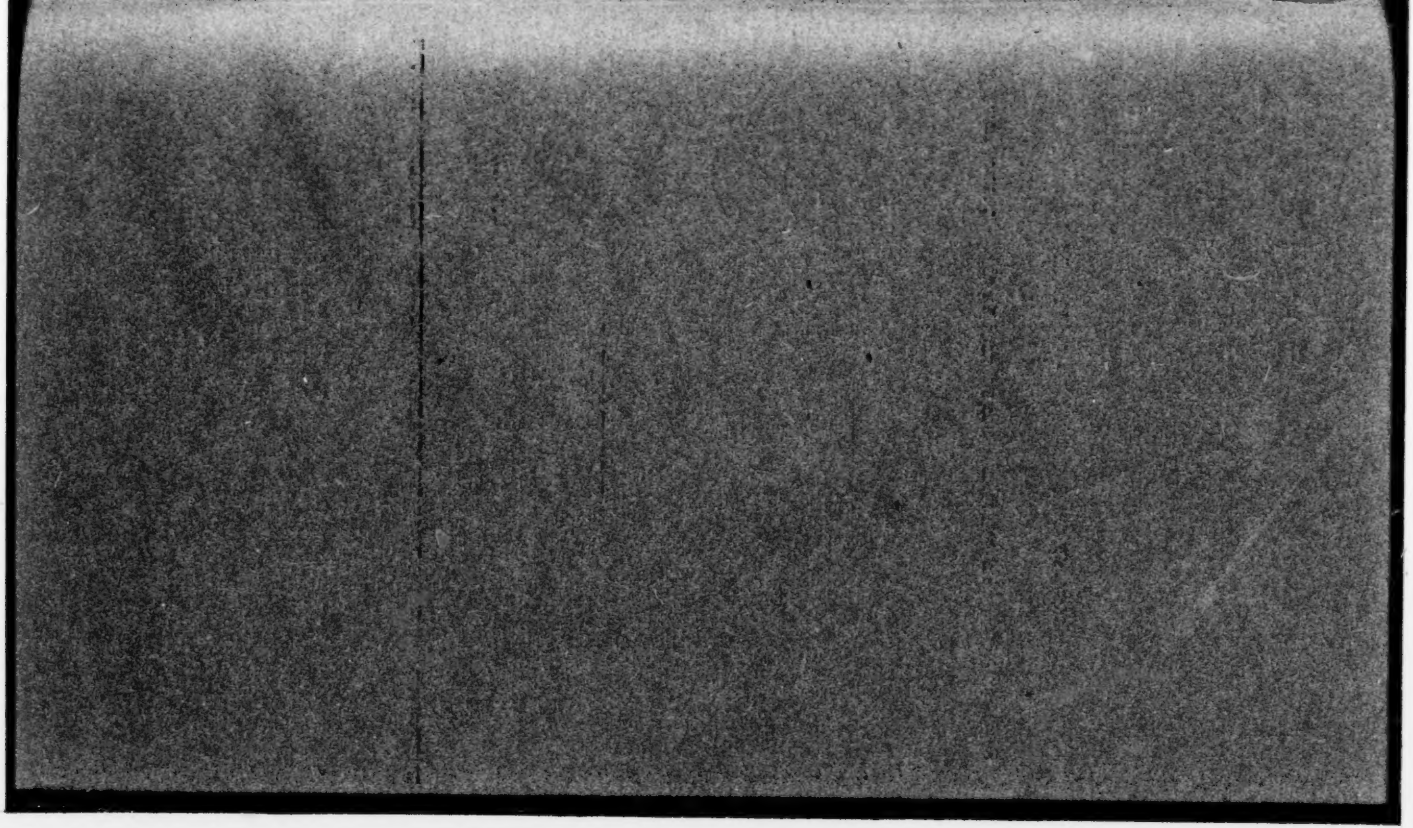
vs.

NORTH GERMAN LLOYD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 18, 1932

CERTIORARI GRANTED MAY 23, 1932



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128204—32—1

1 In United States Circuit Court of Appeals for the Second Circuit

L. 43/186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, DEFENDANT

Statement under rule 13, paragraph 4

The action was commenced by the service and filing of a summons and complaint on October 2, 1928.

The answer was filed on June 19, 1930.

There has been no change in the original parties.

The plaintiff's motion for summary judgment and the defendant's motion for a dismissal of the complaint were argued before Honorable William Bondy on October 7, 1930. The motion was granted on October 8, 1930, and the order for judgment was entered on February 20, 1931.

Judgment for the plaintiff was entered on March 2, 1931. A certificate of probable cause was signed March 3, 1931, and entered March 4, 1931, an dthe appeal was taken on June 1, 1931.

2 In United States District Court, Southern District of New York

L. 43, page 186

North German Lloyd

against

Philip Elting, Collector of Customs, Port of New York

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 1st day of October, A. D. 1928.

[SEAL.]

ALEX GILCHRIST, JR., *Clerk.*

WOOD, MOLLOY & FRANCE,
Plaintiff's Attorneys,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, City of New York.

3 **In United States District Court**

(Title omitted.)

Complaint

The plaintiff corporation for its complaint against Philip Elting, collector of customs of the port of New York, alleges and shows as follows:

1. That at all the times hereinafter mentioned the plaintiff was and still is a foreign corporation, organized and existing under and pursuant to the laws of the Republic of Germany.

2. That at all the times hereinafter mentioned the defendant was and still is the collector of customs of the port of New York.

3. That the plaintiff was at all the times hereinafter mentioned the owner of the steamship "Bremen."

4. That heretofore and on or about the 14th day of February, 1924, the plaintiff brought to the United States on its steamship "Bremen" a certain German alien named Joseph Funk.

4 5. That upon the arrival at the port of New York of the said Joseph Funk on February 14, 1924, he was detained by the immigration officers of the United States at Ellis Island, New York Harbor, and subsequently ordered excluded and deported by the Secretary of Labor.

6. That the Secretary of Labor on or about August 4, 1924, in a notice sent to the plaintiff stated that the ascertained facts indicated that a fine of two hundred dollars ($200.00) and a sum equal to that paid by the said alien for his transportation from his initial point of departure to the port of his arrival, to wit, one hundred and ten dollars ($110.00) should be imposed, and that the ground upon which said fine was imposed and said refund of passage money required was that the said Joseph Funk had been brought to the United States by the plaintiff in excess of the quota for the fiscal year beginning July 1, 1923. That the said notice further stated that the plaintiff would be allowed sixty (60) days within which to submit evidence and be heard in the matter.

7. That thereafter the plaintiff in accordance with the statute and regulations made thereunder duly filed its protest with the Secretary of Labor and submitted its reasons why the said fine and refund should not be imposed.

8. That the evidence submitted and the files, records, notices, and regulations of the Bureau of Immigration, Department of Labor, disclosed and established the following facts:

(a) That said Joseph Funk was the holder of a German
5 passport issued to him at Alzeman, Germany, on December 24, 1923, and that he claimed to be a visitor temporarily visiting the United States for the business of settling and collecting an inheritance.

(b) That the said Joseph Funk was the holder of a passport visa No. 96 issued to him by the consul of the United States at Munich, Germany, bearing date January 24, 1924, with the notation thereon that a visa was granted to him for the purpose of proceeding to the United States on business only within the meaning of section 2 of the restrictive immigration law.

(c) That the said Joseph Funk was in possession of the aforesaid consular passport visa at the time of his embarkation upon plaintiff's vessel "Bremen" and presented the same upon his arrival at the port of New York to the immigration officers there stationed.

(d) That section 2 (a) (4) of the restrictive immigration law (the quota act) of May 19, 1921, as amended May 11, 1922, provided, in part, as follows:

"That the number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910. This provision shall not apply to the following and they shall not be counted in reckoning in any of the percentage limits provided in this act; * * * (4) aliens visiting the United States as tourists or temporarily for business or pleasure."

6 9. That the only appropriate immigration officers of the United States who could decide and pass upon the admissibility of Joseph Funk as an alien visiting the United States temporarily for business and as an immigrant coming within the provisions of section 2 (a) (4) of the aforesaid act of 1921 as amended, were located and stationed in the United States.

10. That thereafter and notwithstanding the protest and the aforesaid facts the plaintiff was notified by the Secretary of Labor that the said fine and refund would not be refunded, and that the notation of the American consul upon the passport visa of the said Joseph Funk "was not a guaranty of the alien's exempt status," and the plaintiff was further notified by the defendant that the Secretary of Labor had directed that the fine and refund should be imposed.

11. That on or about January 31, 1925, the plaintiff's steamship "Bremen" being in the port of New York and about to sail, the defendant refused to clear the said steamship "Bremen" and to issue clearance papers to her and to permit her departure unless the said sum of money, to wit, three hundred and ten dollars ($310.00), fine

and refund, be paid to it. That thereupon and for the sole purpose of securing said clearance papers and avoiding the detention of the vessel and to permit her departure, and to avoid great and irreparable damage the plaintiff under protest deposited the said sum of three hundred and ten dollars ($310.00) with the defendant.

12. That in bringing to the United States the said Joseph
7 Funk, which status as a nonimmigrant and as exempt from quota restriction was prima facie established by the issuance of the consular passport visa and notation to that effect, and the determination of whose status as a temporary visitor for the purpose of business could only be determined by the immigration officers of the Government of the United States stationed in the United States, the plaintiff did not violate any statute of the United States and did not become liable to any fine, and that the Secretary of Labor was without jurisdiction to impose any fine, and that his said act in fining the plaintiff was a clear abuse of power and that the defendant was without authority in law to demand and retain the aforesaid moneys.

13. That the imposition and exaction of said fine and refund were illegal and wrongful and without warrant of law and in direct conflict with the law in such cases made and provided, and that the said sum of three hundred and ten dollars ($310.00) is still now wrongfully and illegally retained by the defendant.

14. That payment has been duly demanded by the plaintiff and neglected and refused by the defendant.

Wherefore, plaintiff demands judgment against the defendant in the sum of three hundred and ten dollars ($310.00) with interest from the 31st day of January, 1925, together with the costs and disbursements of this action.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, New York City.

8 *Duly sworn to by R. T. Kessemeier. Jurat omitted in printing.*

9 In United States District Court

[Title omitted]

Answer

The defendant above named by Charles H. Tuttle, United States attorney for the Southern District of New York, his attorney, for his answer to the complaint herein:

1. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs No. 7 and No. 8 of the complaint.

2. Denies that the defendant notified the plaintiff that the Secretary of Labor had directed that the fine and refund should be imposed, as alleged in paragraph No. 10 of the complaint.

3. Denies each and every allegation contained in paragraphs No. 12 and No. 13 of the complaint.

Wherefore, defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
U. S. Courts and P. O. Bldg., Borough of Manhattan,
City of New York.

Duly sworn to by Philip Elting. Jurat omitted in printing.

11 **In United States District Court**

[Title omitted.]

Notice of motion to strike answer, etc.

SIR: Please take notice that upon the pleadings in this action and upon the affidavit of Rudolph T. Kessemeier, duly verified the 3rd day of July, 1930, and the exhibits thereto attached and the originals thereof referred to, verifying the cause of action and stating the amount claimed and his belief that there is no defense to the action, the undersigned will make a motion before the District Court of the United States, for the Southern District of New York, at the motion part of said court, room 235, post office building, in the Borough of Manhattan, city of New York, on the 16th day of September, 1930, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for summary judgment striking out the

12 answer of the defendant herein, and that judgment be entered as prayed for in the complaint and for such other and further relief as may be just.

Dated, July 23rd, 1930.

WOOD, MOLLOY & FRANCE,
Attorneys for plaintiff,
Office and Post Office Address, 25 Broad Street,
Borough of Manhattan, New York City.

To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Attorney for Defendant.

In United States District Court

[Title omitted.]

Affidavit of Rudolph T. Kessemeier

STATE OF NEW YORK,
County of New York, ss:

Rudolph T. Kessemeier, being duly sworn, deposes and says:

13 That he is the active passenger traffic manager and the duly authorized representative of the plaintiff herein in the United States. That he verified the complaint herein and is personally familiar with all the facts involved and with the allegations contained in said complaint.

That the action herein is brought to recover a fine or penalty of $200.00 and a refund of passage money to the amount $110.00 imposed upon and required from the plaintiff for bringing an alien to the United States allegedly contrary to the provisions of the immigration law.

That the paragraphs of the complaint which set forth the circumstances and details of the said bringing of the alien in question are all admitted by the defendant in his answer. The only allegations of fact in the plaintiff's complaint which are denied in the answer of the defendant are those contained in paragraphs numbered "7" and "88."

James I. Parker, an attorney, located in the Mills Building, Washington, D. C., represented the plaintiff on its protest to the Department of Labor in this case and in all the proceedings had before the Secretary of Labor. Mr. James I. Parker is now dead, so that it is impossible to secure either his testimony or his affidavit.

However, all the matters in paragraphs "7" and "8" which have been denied upon the ground that the defendant has no knowledge or information sufficient to form a belief as to their truth are all matters of record in the files of the Bureau of Immigration, Department of Labor, all of which are available to the defendant and his counsel, and are also established by the notice of W. W. Brown, inspector in charge, law division, U. S. Department of Labor,
14 and the letter of G. E. Tolman, Acting Commissioner General of Immigration, United States Department of Labor, photostat copies of which are annexed hereto, the originals of which will be produced upon the argument of this motion.

That the following are the facts in this case as shown above and are all in records which are within the power of the defendant and his attorney to produce:

1. That James I. Parker, as attorney for the plaintiff, duly protested to the Secretary of Labor against the enforcement of the penalty herein.

2. That Joseph Funk, the alien in question, was the holder of a passport visa No. 96 issued to him by the United States consul at Munich on January 24, 1924, and that said visa bore the notation, "purpose to proceed to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration Law."

3. That Joseph Funk held the above consular visa at the time of his arrival in New York.

That your deponent is informed and believes that there is only a question of law involved in this action, to wit, whether or not the bringing of an alien in possession of a consular visa, certifying that he was proceeding "to the U. S. on business only within the meaning of Section 2 of the Restrictive Immigration law" subjected the plaintiff to a fine on the ground that the alien was in excess of quota. Your deponent is informed and believes that under the law applicable the steamship company is not liable for fine if and when the determination of the admissibility of the alien can only be determined upon his arrival in the United States and that
15 this principle has been repeatedly passed upon and approved by the District and Circuit Court of Appeals of the said district and circuit; that the admissibility of Joseph Funk could only be finally determined by the immigration officials in the United States upon his arrival, and that there is no defense to this action.

That by reason of the foregoing facts the sum of $310.00 with interest from the 31st day of January, 1925, is now due and owing from the defendant to the plaintiff.

Wherefore, deponent prays that the defendant's answer be stricken out and judgment entered for the plaintiff in the sum of $310.00 with interest from the 31st day of January, 1925.

R. T. KESSEMEIER.

Sworn to before me this 3rd day of July, 1930.

[NOTARIAL SEAL.] RUDOLPH SCHLEITNEN,
Notary Public.

Queens Co. No. 1721, Reg. No. 1448.
Cert. filed in N. Y. Co. No. 98, Reg. No. 2–S–128.
Commission expires March 30th, 1932.

16 U. S. Department of Labor, Immigration Service

Filed 98902/669

OFFICE OF COMMISSIONER OF IMMIGRATION,
ELLIS ISLAND, NEW YORK HARBOR, N. Y.
Feb. 14, 1925.

Collector of Customs, port of New York, New York City.

SIR: The department, by letter No. 55395/232 dated Jan. 31, 1925, imposes a fine of $200 in the case of the alien Joseph Funk, ex SS "Bremen," Feb. 14, 1924, your No. 11133, and that amount is to be covered into the Treasury.

Passage money amounting to $110 is to be returned to the alien at in c/o father, Adam Funk, P. O. Alzenan, Bavaria, Germany. Passport issued at Alzenan, Dec. 24/23, visaed at German Consulate at Munich, Jan. 24/24, visa No. 95.

Respectfully,

HF. For the commissioner,

W. W. BROWN,
Inspector in Charge, Law Division.

Copy furnished owners or agents of steamship named above.
North German Lloyd, 32 Bway, City.

17 Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *February 19, 1925.*

NORTH GERMAN LLOYD,
32 Broadway, New York City.

GENTLEMEN: I requested a reconsideration of the decision in the Funk case yesterday and to-day received the following letter from the Bureau of Immigration:

"The bureau refers to your letter of to-day, relative to the fine imposed against the S. S. 'Bremen' for bringing to the United States the alien Joseph Funk, in excess of quota.

"It is true that the American consul considered this alien as one coming to the United States for a temporary visit. The bureau considers that no claim can be made, consistently, that reasonable diligence was exercised to ascertain whether he was actually exempt. The alleged reason for his journey to the United States was to collect an inheritance of some $400. His passage was paid by a relative in the United States; he had no money at all upon his arrival; stated that there was no reason why he could not
18 remain in this country permanently; had no return ticket; and was very indefinite as to his business here. Moreover, the cost of the trip would consume all, or almost all, of the amount of the alleged inheritance, provided he did finally obtain what he said he was coming for. The alien had no documentary evidence as to his business here; he was properly excluded; and, in the bureau's opinion, the line has failed to show that it took any real precaution against the transportation of an inadmissible alien.

"The notation of the American consul, in the bureau's opinion, is merely his explanation of his action in granting visa. You will realize fully that this notation was not a guaranty of the alien's exempt status, and that the line, to be in a position to combat fine proceed-

ings, should have examined the alien at the foreign port and should be in a position to show just exactly what was done to avoid a violation of law. Apparently, however, undue weight was attached to the consular notation, and nothing further done. At least, the apparently irrational claims of the alien do not appear to have been challenged or made the subject of any investigation. The bureau realizes that the notation of the consul carries much weight, but it is not conclusive; and, under the law, the steamship company must assume entire responsibility for transporting this inadmissible alien to the United States, as it is felt that such inadmissibility could have been determined prior to his embarkation, through the exercise of a reasonable amount of diligence.

19 "The bureau, therefore, feels that it can not recommend that any change be made in the outstanding instructions.

"(Signed) G. E. TOLMAN,
"*Acting Commissioner General.*"

I pointed out in the request for reconsideration that the alien was not embarked with the intention of being admitted under the quota—that the quota had been exhausted—and that, consequently, the line had not violated the immigration act of 1921, and was not subject to penalty.

But as the bureau has again ruled that the line had not taken due precaution to determine the actual status of this alien, nothing more can be done at this end.

The next step to be taken rests largely in your discretion. If you wish to go into court, the best way to proceed is to enjoin the collector of customs from turning the money into the Treasury. If your line had documentary evidence showing that it had ascertain the alien's status prior to embarkation, such action might be advisable, but since the alien arrived without means, could not prove by witnesses or otherwise that he had business to transact here, and admitted that he would be glad to remain permanently if such admission were possible, there does not appear to be much ground upon which you can base court action. I greatly regret that the situation is not more favorable.

Very truly yours,

JAMES I. PARKER.
E. S.

20 In United States District Court

[Title omitted.]

Notice of opposition to motion to strike

SIRS: Please take notice that the annexed affidavit of George B. Schoonmaker, verified the 23rd day of August, 1930, will be offered by the undersigned in opposition to the motion before the District Court of the United States for the Southern District of New York, at the motion part of the said court, room 235, post office building in the Borough of Manhattan, city of New York, on the 16th day of Sep-

tember, 1930, for summary judgment striking out the answer of the defendant herein and for judgment as demanded in the complaint.

Dated, New York, N. Y., August 23, 1930.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York,
Attorney for Defendant,
Office and Post Office Address, U. S. Courts and P. O. Bldg.,
Borough of Manhattan, City of New York.

21 To WOOD, MOLLOY & FRANCE, ESQS.,
Attorneys for Plaintiff,
25 Broad Street, New York, N. Y.

In United States District Court

[Title omitted.]

Affidavit of George B. Schoonmaker

STATE OF NEW YORK,
County of New York, ss.:

George B. Schoonmaker, being duly sworn, deposes and says, that he is an assistant United States attorney for the Southern District of New York, and as such has charge of the action herein, and is familiar with the facts and questions involved; that, subsequent to the bringing of this motion by plaintiff, deponent obtained from the Department of Labor of the United States information which indicates that the facts alleged in paragraphs 7 and 8 of the complaint herein are true; that the plaintiff is seeking by the action
22 herein to recover the sum of $310, the amount of a fine imposed by the Secretary of Labor on the plaintiff under the provisions of sec. 6 of the immigration act of May 19, 1921 (as amended by the act of May 11, 1922), and paid to the defendant by the plaintiff under protest; that the said section reads in part as follows:

"That it shall be unlawful for any person * * * to bring to the United States * * * any alien not admissible under the terms of this act or regulations made thereunder, and if it appears to the satisfaction of the Secretary of Labor that any alien has been so brought, such person * * * shall pay to the collector of customs * * * the sum of $200 for each alien so brought, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure * * *. Such fine shall not be remitted or refunded unless it appears to the satisfaction of the Secretary of Labor that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable dili-

gence, by such person * * * prior to the departure of the vessel from the last seaport * * *."

That the plaintiff alleges in paragraph 12 of the complaint herein that the Secretary of Labor abused his power in imposing the said fine; that the defendant in his answer herein has denied the allegations contained in the said paragraph; that deponent believes that the sole issue raised by the pleadings is whether or not the Secretary of Labor acted arbitrarily in imposing the said fine; that deponent believes that the plaintiff cannot prove that the Secretary of
23 Labor so acted without showing what reasons were submitted to the said Secretary as alleged in paragraph 7 of the complaint and also what evidence was submitted to him in support of such reasons; that neither the pleadings nor the plaintiff's affidavit contain such reasons or evidence; that Exhibits A, B, and C annexed hereto are copies of the reasons submitted to the said Secretary by the plaintiff and of one of the answers thereto, the other answer appearing in the plaintiff's affidavit (these exhibits, altho properly part of the plaintiff's case, are submitted herewith in order to assist the court in reaching a final decision herein); that it appears from the said exhibits and from the letter dated February 19, 1925, sent to the plaintiff by its representative, James I. Parker, a copy of which appears in plaintiff's affidavit, that the plaintiff made no independent investigation of the alien's admissibility to the United States but relied solely on the consular visa—reference being made particularly to that part of the said letter from the plaintiff's agent which reads as follows:

"If your line had documentary evidence showing that it had ascertained the alien's status prior to embarkation, such action might be advisable, but since the alien arrived without means, could not prove by witnesses or otherwise that he had business to transact here, and admitted that he would be glad to remain permanently if such admission were possible, there does not appear to be much ground upon which you can base court action."

That deponent believes that the aforesaid facts show that
24 as a matter of law the action of the Secretary of Labor was not arbitrary, and that accordingly, on motion by the defendant the complaint should be dismissed; that deponent believes that the plaintiff concedes that the alien was not in fact an alien visiting the United States as a tourist or temporarily for business or pleasure and concedes that he was brought to the United States in excess of the quota allotted to his country; that deponent believes that the plaintiff concedes that the alien was not admissible to the United States under the terms of the aforesaid act or the regulations thereunder; that deponent believes that the admissibility of each and every alien is always a matter for determination by the immigration authorities in the United States, and that the only sensible construction of section 6 of the said act places on the steamship company the burden of making an independent investigation as to the

admissibility of each alien—the Secretary of Labor not imposing a fine when the steamship company satisfies him that it did not know and could not have ascertained by reasonable diligence that the alien would be denied admission by the immigration authorities in the United States; and deponent accordingly prays that the motion of the plaintiff be denied and that the complaint be dismissed with costs.

GEORGE B. SCHOONMAKER.

Sworn to before me this 25th day of August, 1930.

[SEAL.] RICHARD L. BALTIMORE,
Notary Public.

New York Co. No. —.
New York Co. Register's No. —.
Commission expires March 30, 1931.

25 *Exhibit A to affidavit*

Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *January 28, 1925.*

(55395/232. Joseph Funk)

THE COMMISSIONER GENERAL OF IMMIGRATION,
Washington, D. C.

SIR: It is respectfully submitted that according to the minutes the notation on the passport in this case reads "Proceeds to the United States on business only," etc., and that the testimony of passengers as well as of relatives clearly indicates that the passenger would leave this country immediat'ly after an inheritance was settled.

Attention is called to the fact that the notation made by the consul and the statement made by the passengers before the B. S. I. justify the department in concluding that the North German Lloyd's officials acted in good faith.

It is also respectfully submitted that the record shows a state of facts which it is believed justifies the conclusion that the line did not know and could not have ascertained by the exercise of
26 reasonable diligence prior to embarkation of this alien that he would be found to be inadmissible on his arrival on this side.

I respectfully request, therefore, on behalf of the line in view of the record facts and the line's apparent good faith that no penalty be imposed in this case but that the entire deposit covering both fine and passage money be returned to it and that I be advised of the action taken.

Very respectfully,

NORTH GERMAN LLOYD,
By JAMES I. PARKER,
Attorney.

Exhibit B to affidavit

55395/232.

JANUARY 31, 1925.

COMMISSIONER OF IMMIGRATION,
Ellis Island, N. Y. H.

The bureau refers to your letter of January 10th, No. 98902/669, relative to proposed fine against the S. S. "Bremen," arriving on February 14, 1924, for bringing to the United States the alien Joseph Funk, in excess of the annual quota allotted to Germany, which had been exhausted on January 27, 1924.

The line protests against the imposition of a fine, on the ground that the record will show that there was reasonable diligence shown in accepting this alien, as well as good faith, and that no penalty should be assessed against the company.

27 The record shows that the alien claimed to be coming to the United States to collect an inheritance amounting to about $400 in value. It cost him about half of this amount to come, and though he intimated that he was to return abroad before long, admitted that there was no special reason why he could not remain permanently. The testimony of a witness showed an indefiniteness as to the alleged inheritance which is rather surprising, if it be true that such a thing exists. His passage was paid by a relative in the United States.

The alleged reason for the journey of this alien to the United States was so poor, considering the cost of his ocean passage alone, that the board of special inquiry and department found themselves unable to accept his claim that he would return abroad after a temporary visit. He was not in a position, financially, to make such a journey, had to be assisted by others to come, and admitted that there was no reason for his going back to Germany.

In the bureau's opinion, the line has utterly failed to show that it could not have ascertained, at the foreign port of embarkation, that the alien was inadmissible.

It is ruled, therefore, that the penalty as provided in the act of May 11, 1922, has been incurred, and you are directed to take appropriate action whereby the sum of $200, now on deposit on account of said alien, may be covered into the Treasury as an immigration fine.

The amount of passage is to be returned to the alien, who was deported.

G. E. TOLMAN,
Assistant Commissioner General.

Approved:

———— ————,
Assistant Secretary.
JWB.

28 *Exhibit C to Affidavit*

Phone Main 3628.

James I. Parker

Attorney and Counsellor at Law

Mills Building, Seventeenth Street at Pennsylvania Avenue

WASHINGTON, D. C., *February 18, 1925.*

COMMISSIONER GENERAL OF IMMIGRATION,
Washington, D. C.

(55395/232 Joseph Funk, S. S. "Bremen." Special. Application to reopen and reconsider departmental decision of January 30, 1925)

SIR: I am in receipt of notice from the bureau advising me of the imposition of a fine of $200 against the line in the above designated case, and am submitting herewith at the request of and on behalf of the line an application for the reopening and reconsideration of that decision.

This alien was embarked by the North German Lloyd as a visitor under section 2 (a) (4) of the act of May 19, 1921, as extended, which provides that "aliens visiting the United States as tourists or temporarily for business or pleasure" shall not be counted in reckoning any of the percentage limits provided in this act.

29 Paragraph 10, of rule 22, provides that "where an alien is brought to the United States in violation of the provisions of the act of May 19, 1921, as amended by Public Resolution 55, approved May 11, 1922, the transportation agency bringing such alien shall pay to the collector of customs $200 for each alien so brought and in addition refund cost of transportation."

It is respectfully submitted that transportation was granted to this alien as exempt from the quota, that the quota for Germany had been exhaused, that both the American consul and the agents of the line believed the statements made by the alien bona fide as to his reason for coming to this country, that the consul was convinced of his visitor status and so certified that fact on his visa.

The fact that the alien was unable to prove his claim before the board of special inquiry has no bearing, it is submitted, on the fines case since he was embarked as a visitor and consequently was not "brought to the United States in violation of the provisions of the act of May 19, 1921, as amended by Public Resolution 55, approved May 11, 1922."

It is further submitted that the alien used fraudulent statements to gain transportation to both the consul and the line as to his reasons of coming to this country, and since the statements of the alien before the board of special inquiry differ from his statements abroad, it is an apparent attempt to defraud both the line and the Government, and it is not believed that it was the intent of Congress to penalize a line in such cases, nor to have such aliens profit by the refund of the passage money.

30 In view of the apparent good faith of the line in embarking this alien only after he had claimed exemption from the quota, it is respectfully requested that the outstanding instructions imposing a fine be rescinded, and that the entire amount now on deposit be returned to the line. I ask that I be advised of the action taken.

Very respectfully,

JAMES J. PARKER,
Per J. E. L.,
Attorney for North German Lloyd.

MEMO. ENDORSED

Motion granted on the authority of Compagnie Francaise de Navigation A Vapeur v. Elting, 19 Fed. (2) 773. See Dollar SS. Line v. Hyde, 23 Fed. (2) 910.

Oct. 8, 1930.

WM. BONDY, *U. S. D. J.*

31 In United States District Court, Southern New York

L. 43, p. 186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant

Order for judgment, Feb. 20, 1931

The plaintiff having moved this court for summary judgment as demanded in the complaint and the defendant having also moved for summary judgment dismissing the complaint,

Now, on reading and filing the plaintiff's notice of motion, dated July 23rd, 1930, and the affidavit of Rudolph T. Kessemeier, July

verified July 3rd, 1930, and the exhibits therein referred to, and the defendant's notice of motion, dated August 23rd, 1930, and the affidavit of George B. Schoonmaker, verified August 23rd, 1930, and the exhibits therein referred to, and the pleadings herein, and

after hearing Melville J. France, Esq., of counsel for the
32 plaintiff, and George B. Schoonmaker, Esq., assistant United States attorney, of counsel for the defendant, and due deliberation being had thereon:

On motion of Wood, Molloy & France, attorneys for the plaintiff, it is

Ordered, that the motion for judgment as demanded in the complaint be and the same hereby is granted and the answer stricken out and the motion for judgment dismissing the complaint be and the same hereby is denied, and judgment is hereby directed in favor of the plaintiff in the sum of three hundred and ten dollars ($310.00) with interest from the 31st day of January, 1925, with costs of action; and it is further

Ordered that pursuant to section 989 of the Revised Statutes of the United States a certificate that there was probable cause for the acts done by the defendant, the collector of customs, be granted.

WM. BONDY, *U. S. D. J.*

33 In United States District Court, Southern District of New York

L. 43, p. 186

NORTH GERMAN LLOYD, PLAINTIFF

against

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant

Judgment

A motion for summary judgment having been regularly made before the Honorable William Bondy, at a stated term of this court, and the court having granted the motion and an order having been entered herein on the 20th day of February, 1931, directing that judgment be entered in favor of the plaintiff and against the defendant in the sum of $310.00 with interest thereon from the 31st day of January, 1925, with the costs of the action.

Now on motion of Wood, Molloy & France, attorneys for the plaintiff, it is

Ordered and adjudged that the plaintiff, North German Lloyd, recover from the defendant, Philip Elting, collector of customs of the port of New York, the sum of $423.15 and the further sum of $20.00 costs as taxed, making a total sum of $443.15.

Judgment signed this 2nd day of March, 1931.

CHARLES WEISER, *Clerk.*

34 In United States District Court

[Title omitted.]

Certificate of probable cause

The plaintiff having commenced this action by personal service of the summons and complaint upon the defendant and the defendant having appeared herein by the United States attorney for the Southern District of New York, his attorney, and a judgment having been entered herein on the 2nd day of March, 1931, in favor of the plaintiff and against the defendant for the sum of $310.00 with interest from the 31st day of January, 1925, together with the sum of $20.00, plaintiff's costs as taxed, amounting in all to the sum of $443.15,

Now, therefore, pursuant to section 989 of the Revised Statutes of the United States (title 28, section 42, U. S. C.) I hereby certify that there was probable cause for the acts done by the defendant, the collector of customs.

Dated New York, N. Y., March 3, 1931.

WM. BONDY, *U. S. D. J.*

35 We hereby consent to the entry of the above certificate of probable cause.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff.

In United States District Court

[Title omitted.]

Assignment of errors

Now comes the defendant by George Z. Medalie, United States Attorney for the Southern District of New York, his attorney, and says that the District Court of the United States for the Southern District of New York in rendering the judgment herein, entered March 2, 1931, in favor of the plaintiff and against the defendant erred in the following respects:

First. The court erred in granting the motion of the plaintiff for summary judgment.

Second. The court erred in striking out the answer of the defendant.

36 Third. The court erred in entering the order granting judgment in favor of the plaintiff.

Fourth. The court erred in entering the judgment in favor of the plaintiff.

Fifth. The court erred in holding that there was no issue of fact to be decided by a trial.

Sixth. The court erred in holding that the Secretary of Labor acted arbitrarily and without authority in imposing the fine involved in the suit.

Seventh. The court erred in refusing to hold as a matter of law that the action of the Secretary of Labor was not arbitrary and unlawful.

Wherefore, the defendant prays that the judgment herein in favor of the plaintiff be reversed and held for naught, and that the defendant be restored to all things which he has lost by reason of the said judgment.

Dated, New York, June 1, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the
Southern District of New York,
Attorney for the Defendant.

37 In United States District Court

[Title omitted.]

Petition for and allowance of appeal

Now comes the defendant, Philip Elting, and says that on the 2nd day of March, 1931, the court entered judgment herein against him in the the sum of $443.15, and that by said judgment certain errors were committed to the prejudice of the defendant, all of which will more fully appear in the assignment of errors filed with this petition.

Wherefore the defendant prays for an appeal from the said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, for the allowance of the said appeal, and for leave to prosecute the same, and that a transcript of the record and the proceedings in this cause duly authenticated be forwarded to the said Circuit Court of Appeals.

Dated New York, June 1, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the
Southern District of New York.
Attorney for Defendant.

The above appeal is hereby allowed.

Dated New York, June 1, 1931.

WM. BONDY, *U. S. D. J.*

38 [Citation in usual form omitted in printing.]

39 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a correct transcript of the record in the said District Court in the above entitled matter, as agreed on by the parties.

Dated New York, N. Y., July 29, 1931.

WOOD, MOLLOY & FRANCE,
Attorneys for Plaintiff-Appellee.
GEORGE Z. MEDALIE,
United States Attorney,
Attorney for Defendant-Appellant.

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In United States Circuit Court of Appeals for the Second Circuit

No. 129. October Term, 1931

Argued December 18, 1931. Decided January 11, 1932

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, L. HAND, and CHASE, circuit judges.

Opinion

The plaintiff sued to recover a fine imposed by the Secretary of Labor under section 6 of the restrictive immigration act of 1921, known as the quota act (42 Stat. 5), as amended May 11, 1922 (42 Stat. 540), which it paid under protest. From a judgment for the plaintiff, the defendant has appealed. Affirmed.

The plaintiff brought an alien named Joseph Funk on one of its ships to the port of New York in February, 1924, for entry to the United States. Funk had a German passport and a passport visa issued to him by the American consul at Munich, Germany, January 24, 1924, on which appeared the notation "purpose to proceed to the U. S. on business only within the meaning of section 2 of the restrictive immigration law." He was examined before a board of special inquiry at New York, and was ordered deported upon the ground that he was a quota immigrant because he failed to prove his claim that he was visiting the United States temporarily on business. The plaintiff made an unsuccessful application to the Secretary of Labor for remission of the fine and then brought this suit. There was no proof that the plaintiff made any independent investigation of the alien's claim that he was visiting the United States temporarily on business to satisfy itself as to the truth or falsity of his representations and the notation on his passport visa to that effect.

George Z. Medalie, U. S. Atty., of New York City (George B. Schoonmaker, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Wood, Molloy & France, of New York City, for appellee.

CHASE, circuit judge (after stating the facts as above).

This alien was brought to the United States in accordance with section 2 (a) (4) of the above-mentioned statute (42 Stat. 5), which provides that the quota shall not apply to "aliens visiting the

United States as tourists or temporarily for business or pleasure." It is not claimed that the plaintiff acted in bad faith in bringing the alien here. We agree that it had no right to rely upon the visa to establish his claimed status as a quota exempt. United States ex rel. Spinosa v. Curran (D. C.) 4 F.(2d) 613, affirmed 4 F.(2d) 614 (C. C. A. 2). But the plaintiff at least had probable cause to believe that the alien belonged to one of the classes to which the quota did not apply. If his claim was well founded, he was admissible, and the only way that could be finally determined was by the alien coming to some port of entry to the United States to present his evidence of his right to enter to the officials competent to pass upon it. The statute does not forbid bringing such an alien here so that he can satisfy the proper authorities, if possible, that he has the right to enter. Compagnie Francaise de Navigation a Vapeur v. Elting (C. C. A.) 19 F.(2d) 773. The admissibility of this
42 alien did not depend upon any exericse of discretion by the Secretary of Labor as it did in Dollar S. S. Co. v. Hyde, 23 F.(2d) 910 (C. C. A. 9), where the fine was nevertheless held to have been unlawfully imposed; or in North German Lloyd v. Elting, 48 F.(2d) 547 (C. C. A. 2), where the imposition of fines was held lawful. Funk was not in an excluded class or admissible only in the discretion of the Secretary of Labor, but was a nonquota alien if his evidence was credible and of due weight, and so entitled to be heard by the proper officials and to have all his evidence in support of his claim to entry as of right duly considered by them in fixing his status. A transportation company acting in good faith is not liable to a fine for bringing him here for such a purpose. What was said in Compagnie Francaise, etc., v. Elting, supra, on this subject applies with equal force to this case, for his right to enter was absolute if he came here temporarily on business.

Judgment affirmed.

L. HAND, circuit judge, dissents in opinion.

43 In United States Circuit Court of Appeals for the Second Circuit

No. 129. October Term, 1931

Argued December 18, 1931. Decided January 11, 1932

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK, defendant-appellant

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, L. HAND, and CHASE, circuit judges.

Dissenting opinion

L. HAND, circuit judge (dissenting).

Section 6 of the quota act of 1921 imposes a fine upon any carrier which brings to this country an alien who is "not admissible." If there were no more, it would make the carrier absolutely liable, regardless of the difficulty, or indeed the out and out impossibilty, of detecting admissibles from inadmissibles before embarkation. To moderate the severity of this, the Secretary is given power to remit the fine if he thinks that the carrier could not have discovered the truth by reasonable diligence; but this power is his, not ours. No alien is ever admitted until he gets here and is examined, so that the carrier in all cases takes a chance when it brings one in. That chance may be remote, as for example when the ground for exclusion is a detectable disease; it may be very great, as where the admission depends upon the alien's ability to earn a living, a standard about which people are bound to differ. But in all cases there is some chance, and the carrier must take it and rely upon the lenity of the Secretary, if the alien is excluded.

We did indeed make an exception in Compagnie Francaise v. Elting (C. C. A.) 19 F. (2d) 773, a case where the alien was returning home from a temporary sojourn. This we did because of a departmental rule especially applicable to that situation, under which he was allowed to reserve his evidence until he arrived at the home port. Rightly or wrongly we thought this situation different because of that rule, upon which alone we squarely placed our earlier decision in North German Lloyd v. Elting (C. C. A.) 48 F. (2d) 547, where the facts were in my opinion indistinguishable from those at bar. The exception is now to swallow the rule, and consistently we shall always in the future have to exercise the discretion which the statute gives to the Secretary.

44 In United States Circuit Court of Appeals, Second Circuit

NORTH GERMAN LLOYD, PLAINTIFF-APPELLEE

vs.

PHILIP ELTING, AS COLLECTOR, ETC., DEFENDANT-APPELLANT

Judgment filed Jan. 18, 1932

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

45 [File indorsement omitted.]

46 [Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

Order allowing certiorari. Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

47F [Indorsement on cover:] File No. 36,699. U. S. Circuit Court of Appeals, Second Circuit. Term No. 42. Philip Elting, collector of customs, port of New York, petitioner, vs. North German Lloyd. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1932. File No. 36,699.

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